Filed 1/12/10 Dolley v. Superior Court CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DENISE DOLLEY, as Cotrustee, etc., Petitioner, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; KENNETH CUMMINS et al., Real Parties in Interest.	G042869 (Super. Ct. No. A226263) O P I N I O N

Original proceedings; petition for a writ of mandate/prohibition to challenge an order of the Superior Court of Orange County, Mary Fingal Schulte, Judge. Petition granted.

John L. Dodd & Associates and John L. Dodd for Petitioner.

No appearance for Respondent.

Bidna & Keys and Richard D. Keys for Real Party in Interest Kenneth Cummins.

Marc T. Eagan for Real Party in Interest Robert Matthews.

This is a writ petition seeking relief on the basis the trial court failed to follow this court's directions on remand from an earlier appeal. In our prior opinion, we concluded a settlement entered into between Denise Dolley, the cotrustee and primary beneficiary of the Marianna Callies Trust (the Trust), and her son-in-law Robert Matthews (acting as guardian for his two daughters, the contingent secondary beneficiaries of the Trust), did not curtail Dolley's right to remove her cotrustee, Kenneth Cummins – with or without cause – and replace him with a different qualified cotrustee. We directed the probate court, on remand, to remove Cummins, and allow Dolley to choose his replacement.

The court's own minute order did essentially that, naming Richard Huntington (who had been chosen by Dolley) as a "willing and qualified" replacement for Cummins, requiring Huntington to post a bond in the amount of $412,500, and ordering Cummins to remain as cotrustee until Huntington was "in place." Unfortunately, the formal proposed order submitted by Cummins in the wake of the hearing did much more than the court's minute order specified, and included provisions (1) purporting to impose a sweeping limitation on Dolley's powers as cotrustee, despite the probate court's specific recognition that doing so was outside the scope of this court's direction; (2) reflecting a purported "stipulation" to prohibit any sale or encumbrance of Dolley's residence without court order, despite the fact the record reflects no such stipulation; and (3) reflecting a purported "stipulation" to immediately exonerate Cummins' bond, despite the fact the record reflects no such stipulation.

Even more unfortunately, the probate court signed that proposed order, even though it went far beyond the court's own minute order, and despite the fact Dolley's counsel had refused to approve it as to form and content. It was plain error for the court to do so, and we consequently issue a peremptory writ of mandate in the first instance, directing the probate court to vacate its October 6, 2009 order, and enter a new order reflecting only: that Huntington is appointed as the successor cotrustee to

Cummins; that he shall exercise the same powers given to Cummins under the terms of the settlement agreement entered into between Dolley and Matthews; that he is required to post a bond in the amount of $412,500, and that his appointment shall take effect once he has done so.

Additionally, we note that presentation of a knowingly false order to gain a litigation advantage is "a basic violation of an attorney's role oath, and duties" (*Maltaman v. State Bar* (1987) 43 Cal.3d. 924, 957), and is clearly inconsistent with the obligations of a neutral trustee. If the probate court determines that such conduct occurred in this case, it may be punishable as a contempt (Code Civ. Proc., § 1209, subds. (a)(3) ["willful neglect or violation of duty by an attorney"], (a)(4) ["[a]buse of the process or proceedings of the court or falsely pretending to act under authority of an order or process of the court"], and (a)(8) ["[a]ny other unlawful interference with the process or proceedings of a court"]) and constitute grounds for State Bar disciplinary proceedings against Cummins' attorney.

I

FACTS[1]

The litigation is an ongoing trust dispute, in which Dolley, who is the primary beneficiary and cotrustee of a trust created by her daughter, Marianna Callies (now deceased), is doing battle with her son-in-law, Matthews, who has long sought to limit her control over the trust corpus, in the apparent hope of preserving as much of it as possible for his daughters – the contingent secondary beneficiaries.

According to the Trust document, the property included therein was originally owned by Dolley, who gave it to Callies "with the expectation that [Callies] would take care of [Dolley] for life with those gifts." When Callies became very ill, she

[1] Our rendition of the facts is confined to matters supported by the records filed in connection with the prior appeal and this writ proceeding. Although both Cummins' and Matthews' responses to the writ petition are replete with factual "background" information, none of that information is supported by any citation to the record before us. We must consequently disregard it.

created the Trust, naming herself and Dolley as cotrustees and primary beneficiaries. The Trust specifies that the trustee shall pay or apply to the benefit of Callies and Dolley, or the survivor of them, the net income from the trust, as well as whatever portion of the principal is needed for "proper support."

The Trust further provides that Callies' two daughters, the contingent secondary beneficiaries of the Trust, would share in whatever remained of the Trust only after Dolley's death.[2] Although Dolley's son-in-law, Matthews, continues to insist the Trust is intended to benefit his and Callies' daughters in addition to Dolley, and thus reflects a competing goal of preserving the assets for their benefit, the trust itself does not specify such a goal.[3] Instead, the trust reflects only the goal of ensuring Callies' and Dolley's proper support during their lifetimes, followed by the disposition of any remaining corpus to the secondary beneficiaries after Dolley's death.

The Trust document gave Dolley the right, in her capacity as the sole primary beneficiary, to select a successor cotrustee to fulfill her daughter's position once Callies died. After Callies' death, Dolley did so, but the first successor cotrustee resigned at the behest of Matthews, and the second one appointed – a friend of Dolley's named

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[2] The only exception to that general rule is a provision stating that if the Trust possessed "the entire interest" in a designated property, then the granddaughters were entitled to a monthly distribution based roughly on the rental payments received on account of the property. However, the Trust did not possess the entire interest in that property, so the provision never became operative.

[3] In his opposition to the writ, Matthews actually contends that the Trust was intended to provide for *him* personally, as well as his daughters, but he cites nothing in the record to support that claim, and we are aware of nothing. The Trust provisions reflect the intention to provide for Dolley's "proper support" during her lifetime, with Matthews' daughters simply receiving whatever may be left after Dolley's death. Matthews himself is not provided for at all.

Moreover, in connection with the prior appeal, Matthews had acknowledged that the provisions of the Trust, as written, give Dolley significant benefits, while treating Dionisia and Malina as "more of an afterthought." However, he then argued that this could not have been reflective of Callies' *true intent*, since their daughters were "the most important people" to her. He claimed that as a result of chemotherapy treatments and other medications, his wife had been experiencing "fuzzy" thinking during the period of the Trust's creation, and that "it was difficult for [her] to complete simple tasks." He went on to imply that the attorney who drafted the Trust may have improperly favored Dolley's interests in contravention of Callies' true intent. We noted in our prior opinion that these contentions were "wholly improper," and suggested that if Matthews believed the Trust could be challenged on the ground that Callies had been subject to undue influence, or was somehow not competent at the time of its creation, he was free to assert such a challenge at an appropriate time. To our knowledge, he has never sought to do so.

Murshed Alam-Ahmed – was not to his liking either. Apparently, neither Dolley nor Alam-Ahmed were particularly good at keeping up with the requirements of trust administration. As a consequence of that, as well as other concerns about their handling of the Trust and its assets, Matthews initiated a petition seeking their removal as cotrustees of the Trust.

That dispute was ultimately settled, with the settlement specifying that Alam-Ahmed would resign as cotrustee, and be replaced by Cummins (who had been selected by Dolley). The settlement designated Cummins to act as the "administrative and investment co-trustee," and specified he had responsibility for all mandatory administrative details (tax returns, etc.). Cummins was also given responsibility for "all Trust investment decisions," but those decisions were explicitly made "subject to the prior approval of Dolley as consulting co-trustee." The settlement confirmed that Dolley maintained certain rights under the Trust, such as "the right to sell" her primary residence, which was part of the trust corpus, and the right to "receive any portion of the [Trust] principal to meet her needs." However, except for assigning responsibility for administrative duties to the "administrative and investment trustee," nothing in the settlement restricted Dolley's existing rights or responsibilities as cotrustee or as beneficiary.

After the parties reached that settlement, but before they signed the formal agreement documenting its terms, a conflict developed between Dolley and Cummins in connection with separate trust-related litigation, and she elected to replace him as her cotrustee. Both Matthews and Cummins opposed her attempt to do that – even though Cummins himself had initially determined he had a conflict of interest and should not serve, a determination he later recanted. Matthews and Cummins argued the settlement had restricted Dolley's rights to do *anything* other than "consult" on investment decisions. The probate court (per Judge Marjorie Laird Carter) seemed to agree with that interpretation. While the court conceded that the entirety of the restrictions imposed on

Dolley by the settlement were not "clear by the paperwork . . . and the order that was signed, *it was clear in the court's mind*." The court thus concluded that the parties' settlement had deprived Dolley of the power to replace her cotrustee.

That denial was appealed, leading to our prior opinion. In that opinion, we reasoned that the parties' settlement, while assigning to Cummins, the "administrative and investment co-trustee" the responsibility for all administrative obligations, had also provided that "he and Dolley actually *share* the power to make investment decisions – the only *discretionary* power expressly mentioned in the settlement." (*Dolley v. Cummins* (Aug. 28, 2008, G039330) [nonpub. opn.], p. 15.) This court then noted that while the settlement also "acknowledged" that Dolley's power to receive any portion of the Trust principal to meet her needs was governed by Probate Code section 16081 – which provides that if discretionary power to determine distributions of income or principal are conferred on two or more trustees, such power may be exercised by any trustee who is *not* also a beneficiary – that acknowledgement merely *confirmed* the application of existing law to the Trust, and thus did not actually change anything.[4]

The opinion summarized the relevant terms of the settlement as follows: "(1) [Cotrustee] Alam-Ahmed will resign, and be replaced with Cummins, who is a professional cotrustee; (2) Cummins is expressly assigned the task of carrying out the administrative responsibilities for the Trust; (3) investment decisions are to be made by agreement between the cotrustees, and then carried out by Cummins; and (4) Dolley is precluded from exercising the discretionary power to determine Trust distributions to herself." (*Dolley v. Cummins, supra*, G039330, p. 16.) As this summary demonstrates, the settlement did not deprive Dolley of any discretionary power she previously had.

Because nothing in those settlement terms suggested the parties had intended to restrict Dolley's right, as trust beneficiary, to remove her cotrustee, this court

[4] Similarly, the settlement also *confirmed* Dolley's right, under the terms of the Trust, to "sell the primary residence . . . pursuant to section 6.19 of the Trust."

concluded she retained that power under the terms of the Trust, and that the probate court had erred in rejecting her attempt to exercise it. On remand, we directed the probate court to: "enter an order removing Cummins as cotrustee of the Trust, and recognizing the appointment of Paul Bednarski [the cotrustee originally selected by Dolley] to act in his stead. If given the passage of time, Bednarski is no longer able and willing to serve, the court shall appoint a different professional cotrustee of Dolley's choosing." (*Dolley v. Cummins, supra,* G039330, p. 19.)

In our opinion, we also expressly chastised Cummins, noting that in the wake of a trial setting conference in the probate court, he had filed "a self-serving 'Notice of Rulings' in which he purported to explain that the court had issued specific 'orders' regarding the legal effect of the settlement terms" at that trial setting conference, even though "the court had done no such thing." We pointed out that Cummins had then aggravated the situation by filing a "respondent's appendix" in this court, "for the sole purpose of bringing that bogus 'notice' document to our attention." (*Dolley v. Cummins, supra,* G039330, p. 10, fn. 7.) Obviously, we anticipated that such a direct statement of disapproval would cause Cummins and his counsel to exercise more caution in the future.

In the wake of that opinion, a lot has happened, but nothing like what was directed in our opinion. Due to the passage of time while the matter was on appeal, Bednarski declined to serve, and Dolley selected another candidate, Nancy Thornton. Thornton agreed to serve, and the probate court (per Judge Mary Fingal Schulte) ordered she be appointed cotrustee on May 26, 2009. However, by June 8, 2009, it appeared that Thornton was no longer willing to serve, and the court ordered that Cummins "remains co trustee of the Trust until such time as Ms. Dolley profers [*sic*] a professional co trustee who is willing and able to serve."

On July 7, 2009, a different judge in the probate court signed an order appointing Bednarski as cotrustee, and removing Cummins "pursuant to the written decision of [this court]." However, it does not appear that order was ever acted upon, and

it was later vacated. On July 10, 2009, Dolley filed a formal petition to appoint Richard Huntington as cotrustee, in place of Cummins "in accordance with Appellate Opinion."

Cummins – the departing trustee – filed a "response" to the petition, stating (among other things) that he believed it would be in the "best interests of the trust . . . for the court to issue an order clearly defining Mr. Huntington's (or anyone else serving as trustee) powers, duties, obligations and authorities – and clearly defining the role that Ms. Dolley is to play as 'consulting co-trustee.'" He informed the court that Dolley and Matthews have different interpretations of her cotrustee role in the wake of their earlier settlement, and that while he, Cummins, has no opinion, he thought the court should be aware that the prior judge on the case (Judge Marjorie Laird Carter) had twice expressed the opinion that Dolley's role was "limited to having the right to approve 'investment decisions'. . . and that [Cummins] was appointed to, and had the authority to, exercise all other discretionary functions of a trustee – such that Cummins and Ms. Dolley were definitely not co-equals." *Cummins did not, however, acknowledge that Judge Carter's interpretation of the settlement had been rejected by this court when it reversed her decision in the prior appeal.*

Cummins also informed the court that another trial judge, in a related civil case, "express[ed] his concerns that Ms. Dolley (and Mr. Ahmed) should not have any further involvement in the management of the trust and that Mr. Ahmed exercises undue influence over Ms. Dolley." He noted that "[t]he Court of Appeal was not aware of" that judge's findings, because they had been made after the appellate opinion.

Cummins also submitted a "proposed order" with his response, in which he included language imposing a sweeping restriction on Dolley's power to act as cotrustee: specifically, he proposed that Dolley's "rights and powers as co-trustee shall be limited to reviewing and approving investment decisions, and Mr. Huntington *shall exclusively have all other powers and authority granted to the trustee under the trust instrument*." (Italics added.)

Cummins' proposed order also included a provision requiring him to "file with the Court and serve on all trust beneficiaries a final accounting covering his activities as trustee from his initial appointment," and authorizing him to retain sufficient funds to pay the premiums on his fiduciary bond during the period of transition to the new cotrustee.

Matthews officially *opposed* the appointment of Huntington, arguing "[h]is appointment will simply create costs that place an undue burden on a trust corpus that is needlessly dwindling because of Mrs. Dolley's frivolous actions and her failure to understand her role as the Trust's fiduciary." He asserted Dolley is on a "never ending quest to obtain the most submissive Co-Trustee [which] has adversely affected the economic well-being of the Trust." He objected to the appointment of Huntington on the basis that he is "not qualified to be appointed as a Co-Trustee," noting that "his website does not give any indication that he possesses the skills and experience necessary to properly administer the Trust." Matthews also relied heavily on the comments made by the judge in the related civil case, as evidence that Dolley remains unduly influenced by Mr. Ahmed and is otherwise unfit to act as a cotrustee. Matthews went so far as to provide the probate court with a transcript of that other judge's comments.

On August 13, 2009, the court held a hearing on the petition to appoint Huntington. In the course of the hearing, the court noted that "there's all the issues of the trustees powers. I can't rewrite the trust, but I thought that the appellate decision pretty much clarified what powers the trustees had, and I think Ms. Dolley's only power is that she is just a consulting co-trustee." In that respect, however, the court appeared to be conflating Dolley's *powers* with her *title* – even though this court's prior opinion clearly stated the trustee titles used in the settlement were "confusing" and had no "accepted legal meaning." (*Dolley v. Cummins, supra,* G039330, p. 14.) However, the probate court then went on to correctly note that the appellate decision "*didn't order me to lay out the duties of the trustee . . . .*"

The court determined that Huntington was qualified to serve as cotrustee, and turned to the issue of a bond. With respect to the amount of the bond, Cummins' attorney suggested that in lieu of a higher bond amount which took into account the value of the Dolley's residence, the amount instead be based upon the cash held by the Trust ($375,000), and then be accompanied by a restriction on the sale of Dolley's residence – which under the terms of the Trust (later specifically confirmed in the Dolley's settlement with Matthews) Dolley had been given the express power to "direct" the trustee to sell – specifying the residence could not be sold except on order of the court.

Matthews' attorney agreed with this property-sale restriction, but Dolley's did not. Instead, Dolley's attorney argued that under the terms of the Trust, Huntington was not required to post any bond at all. The court did not respond to that point, but instead turned to a computerized "bond calculator," which calculated a bond amount of $412,500.

The court then immediately inquired "once that's posted and Mr. Huntington is in place, what are we going to do with Mr. Cummins? His bond is being exonerated?" The parties noted that while Dolley had expressed the intention to seek an accounting of his tenure, she had not yet done so. The court then moved on, stating that upon Huntington's appointment as cotrustee, the division of labor between he and Dolley would remain the same as it had been between she and Cummins.

At the conclusion of that hearing, Cummins' attorney reminded the court he had submitted a proposed order which he acknowledged "might be in need of a little doctoring," and the court replied "well, submit something so that everyone approves it as to form and content." The court then issued its own minute order.

The court's minute order vacated the earlier order by which a different judge had removed Cummins and appointed Bednarski in his stead; and also declared that Huntington was willing and qualified to serve as cotrustee, and ordered him to post a bond in the amount of $412,500. It contained no provision specifying any particular

limitation on Dolley's powers as cotrustee; no provision altering the trust provisions concerning the sale of Dolley's residence; and no provision exonerating Cummins' bond. Indeed, with respect to Cummins, the minute order makes clear he is to *remain as co-trustee* "until the new co-trustee is in place."

The proposed order circulated to the other parties by Cummins was significantly different. As in his original "proposed order," and despite the court's express acknowledgment at the hearing that it had *not been directed* by this court "to lay out the duties of the trustee," Cummins included the language purporting to limit Dolley's powers as cotrustee. It provided: "Huntington shall have the powers and responsibilities of the 'administrative and investment co-trustee' previously conferred upon Mr. Cummins in connection with the settlement agreement . . . . Denise Dolley shall continue to serve as 'consulting co-trustee' in accordance with the terms of such settlement; *provided however, that Ms. Dolley's rights and powers as cotrustee shall be limited to reviewing and approving investment decisions, and Mr. Huntington shall exclusively have all other powers and authority granted the trustee under the trust instrument.*" That italicized provision is nowhere contained in either the settlement agreement entered into between Dolley and Matthews, nor this court's prior opinion.

Cummins' proposed order also reflected that in lieu of a larger bond for Huntington, "the parties *have stipulated*, and the Court orders" that Dolley's residence cannot be sold or encumbered, except upon order of the court. (Italics added.) However, as the reporter's transcript reflects, no such stipulation was reached at the hearing.

Finally, the proposed order reflects that "[*p*]*ursuant to the stipulation of the parties*, the fiduciary bond posted by Cummins . . . is hereby exonerated, and such surety shall have no further liability to any person on account of such bond." (Italics added.) Again, the record reflects no such stipulation.

Although Matthews approved the proposed order as to form and content, Dolley refused to do so, and instead proposed an alternative order which provided that

Huntington and Dolley are "co-equal trustees pursuant to the terms of the trust, subject to the . . . Terms of Settlement Agreement filed February 21, 2006, and subject further to the decision of the California Court of Appeal[] . . . issued August 28, 2008." Dolley's proposed order also removed the language reflecting a "stipulation" and order restricting the sale or encumbrance of Dolley's home, and removed the language regarding any stipulation or order to exonerate Cummins' bond.

On October 6, 2009, the court signed Cummins' proposed order.

Dolley filed a petition for writ of mandate requesting this court to vacate the October 6, 2009 order, and to order the probate court to enter a new and different order merely implementing the directions of our prior order. We invited Matthews and Cummins to file informal responses to the petition, which they did. We have read and considered those informal responses.[5]

For the reasons set forth below, we determine the trial court plainly erred in issuing the order proposed by Cummins and approved by Matthews. Because "[Dolley's] entitlement to the relief requested is so obvious that no purpose could be served by plenary consideration of the issue," we issue a peremptory writ of mandate in the first instance. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1260.)

II

THE DEFECTS IN THE ORDER

Dolley has specifically challenged the portions of the October 6, 2009 order, which (1) purport to limit her powers as cotrustee; (2) require Huntington to post a bond as a condition of serving as cotrustee; (3) require the cotrustees to obtain a court order for any sale or encumbrance of her residence; and (4) exonerate Cummins' bond. We address those issues in order.

[5] On November 30, 2009, Dolley also filed an appeal from the order, to preserve her appellate rights.

a. The Language Limiting Dolley's Powers as CoTrustee

The first paragraph of the court's order provides that Huntington is appointed as "administrative and investment co-trustee" in place of Cummins. It then specifies that "Huntington shall have the powers and responsibilities of the 'administrative and investment co-trustee' previously conferred upon Mr. Cummins in connection with the settlement agreement . . . . Denise Dolley shall continue to serve as 'consulting co-trustee' in accordance with the terms of such settlement; *provided however, that Ms. Dolley's rights and powers as cotrustee shall be limited to reviewing and approving investment decisions, and Mr. Huntington shall exclusively have all other powers and authority granted the trustee under the trust instrument.*"

Dolley's objections to this provision are two-fold. First she argues the settlement entered into between she and Matthews, which divided the duties between cotrustees, and assigned all administrative responsibilities to Cummins as "administrative and investment cotrustee," was intended to be binding only to the extent Cummins himself remained a co-trustee, and should have no further effect once he is removed. We cannot agree.

First, the settlement was not entered into between Dolley and Cummins. She entered into it with *Matthews*, and his interest in ensuring the proper administration of the Trust was in no way tied to Cummins' tenure as cotrustee. Nor was there any evidence the division of labor set forth in the settlement agreement was inspired by some particular attribute or skill possessed by Cummins specifically. To the contrary, the context in which the settlement was arrived at – a petition to remove Dolley herself as cotrustee – demonstrates that the primary concern was *Dolley's own inability* to fulfill those administrative responsibilities. Thus, the agreement provided that she could remain as cotrustee, but only if she agreed to assign the administrative responsibilities to a qualified cotrustee.

More importantly, given that Dolley retained her unfettered right under the terms of the trust to terminate her cotrustee with or without cause (as we concluded in our prior opinion), limiting the settlement terms to the duration of that particular cotrustee's tenure would allow her to terminate it at will and thus render its terms illusory. "An agreement that provides that the . . . performance to be rendered, shall be left to the will and discretion of one of the parties is not enforceable. This is because the party having such discretion makes no real promise to pay or to perform. An illusory promise is no promise at all and is not a sufficient consideration for a return promise." (*Automatic Vending Co. v. Wisdom* (1960) 182 Cal.App.2d 354, 357.)

In the absence of a clear provision rendering the settlement agreement applicable only during the tenure of Cummins, we decline to "interpret" it as having any such effect. We thus conclude the settlement agreement, and its division of labor provision, survives the departure of Cummins.

However, Dolley's second basis for objecting to the provision in the October 6, 2009 order, which purports to limit her powers fares better. As she asserts, we determined in our prior opinion that the restrictions imposed upon her by the settlement with Matthews were relatively modest. Certainly, the administrative duties were expressly assigned to her cotrustee, as was responsibility for carrying out investment decisions (if approved by Dolley). And while the settlement did reaffirm that discretionary decisions regarding the payments to be made to her as beneficiary were governed by Probate Code section 16081, that affirmation did not effect any change in Dolley's powers. In fact, as we noted in our prior opinion, the settlement itself does not expressly deprive Dolley of any discretionary power she possessed prior to entering into it. Thus, to the extent Dolley had other such powers in her capacity as cotrustee prior to the settlement, she still has them.

Cummins argues that even if the settlement, as interpreted in our prior opinion, does not justify the language he inserted into the court order, that language was

"not inconsistent" with our ruling, because the probate court remained free to "*also* put[] restrictions on Ms. Dolley's powers as co-trustee." According to Cummins, the probate court has "inherent power to remove Dolley as trustee or restrict her powers as a co-trustee notwithstanding the prior appellate opinion or the prior settlement agreement." And because "[t]here was ample evidence presented to Judge Schulte to justify an order limiting Ms. Dolley's powers – most particularly the express *findings* by [the judge in the related civil case] . . . that Ms. Dolley was subject to undue influence by Mr. Ahmed and was unfit to serve as trustee," the probate court was free to impose those restrictions sua sponte at the hearing regarding the appointment of Huntington.[6]

We reject Cummins' argument. Whatever inherent power the probate court may have to restrict Dolley's powers as trustee, in the absence of some emergency circumstance it would be an abuse of discretion to do so without any advance warning, or to base that decision on the factual conclusions of a *different* judge, presiding in a *different* case, without any showing that those conclusions were legally entitled to some preclusive effect here. (See, e.g., *Wimsatt v. Beverly Hills Weight Etc. Internat., Inc.* (1995) 32 Cal.App.4th 1511, 1516 ["Being a matter of issue preclusion, collateral estoppel is naturally confined to issues 'actually litigated'" in the prior case].) No such showing was made.[7]

Moreover, the record here belies any contention the probate court intended to impose new restrictions on Dolley's powers, as an independent act, in the course of considering the appointment of Huntington as successor cotrustee. The only comments the probate court made bearing upon the point at the hearing were (1) its

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[6] Matthews makes a similar argument, relying on Probate Code section 15409, subdivision (a) for the proposition that the court has power to modify "the administrative or dispositive provisions of the trust" on petition by a trustee or beneficiary. Of course, no such petition was filed in this case.

[7] Fortunately, *that* court recognized its limitations, even if Cummins does not. As reflected in Cummins' excerpts of the civil court's "findings," it appears that court expressly noted its lack of authority to make any such binding determinations regarding Dolley's suitability to remain as cotrustee. The court prefaced its "opinions" about Dolley with the disclaimer that "[w]hile matters related to the administration of the Marianna Callies Trust are within the jurisdiction of the probate court . . . [this] court is of the opinion that . . . ."

acknowledgement that this court had not directed it to "lay out the duties of the trustee," and (2) its explicit agreement, in response to a question by Matthews' counsel, that the duties of the cotrustees would "remain the same as when Mr. Cummins was the co-trustee." Those comments contradict any inference that the court intended to impose *new restrictions* on Dolley's powers at that time. We consequently reject that inference.

Because neither the settlement itself, nor our prior opinion justifies an order which does anything more than merely confirm that Huntington will take over the role of "administrative and investment cotrustee," while Dolley will remain as "consulting cotrustee," and the court made clear it had no intention of altering that relationship during the hearing, it erred in signing an order which contained the sweeping statement that "Ms. Dolley's rights and powers as a co-trustee shall be limited to reviewing and approving investment decisions, and Mr. Huntington shall exclusively have all other powers and authority granted to the trustee under the trust instrument."

That language was plainly erroneous and should not have been included in the court's order.

b. The Requirement that Huntington Post a Bond

Dolley next argues the bond provision was erroneously imposed, again for two reasons: First, she asserts that because no bond requirement was specified in this court's directions on remand, none should have been imposed; and second, she argues that a bond requirement contradicts the provisions of the Trust. Neither point is persuasive.

Our prior opinion, which directed the probate court to appoint a different cotrustee of Dolley's choosing, was silent on the issue of a bond requirement. It neither required one for the successor cotrustee nor precluded one. Consequently, it was reasonable for the probate court to consider the propriety of imposing a bond in connection with the appointment of Cummins' successor, just as it would have been free

to do so had it appointed the new cotrustee *prior* to our opinion, when Dolley had initially sought it.

Dolley's second argument has some surface appeal. As she notes, the trust itself states explicitly that "*[n]o bond or undertaking shall be required of any individual who serves as trustee under this instrument.*" Dolley notes that Huntington is an individual, and thus seems to be clearly governed by that provision.

However, as Cummins points out, Probate Code section 15602, subdivision (a) provides that a bond is *required*, even where waived in the Trust itself, whenever "[a]n individual who is not named as a trustee in the trust instrument is appointed as a trustee by the court." That statute goes on to empower the court to excuse the bond requirement, but in the case of an individual not named as trustee in the instrument, the court must have "compelling circumstances" to justify such an excuse.

In light of that statute, and considering that Cummins himself has served under a bond, we conclude the court was justified in imposing a bond requirement on the new trustee as well.

c. The Language Restricting the Sale or Encumbrance of Dolley's Residence, Except Upon Court Order

Dolley has also sought relief from paragraph 2 of the court's order, which provides that "[i]n lieu of a larger bond for Mr. Huntington, the parties have stipulated . . . that [Dolley's residence] . . . may not be sold, hypothecated, refinanced, or encumbered, except upon order of this Court."

The provision cannot stand, as there is no evidence of the purported "stipulation" upon which it rests. At the hearing, Matthews agreed to such a restriction, but Dolley clearly did not. Cummins does not dispute that fact, but simply argues instead that it was Dolley's own (former) counsel who had initially proposed such a restriction, and thus wonders "[w]hy would Ms. Dolley have any problem with or objection to such an order?"

However, whatever the informal views of Dolley's prior counsel, the record reflects that Dolley's counsel at the hearing never agreed to such a provision. If the court felt that the lower bond amount was insufficient in light of the value of the residence, it could have increased the amount. It could not, however, just impose a new restriction on the powers of the cotrustees under the Trust without advance notice, on the basis of a nonexistent "stipulation."

d. Paragraph 4 of the Order, Exonerating Cummins' Bond

Finally, Dolley challenges paragraph 4 of the order, which provides that "[p]ursuant to the stipulation of the parties, the fiduciary bond posted by Cummins . . . is hereby exonerated . . . ." She notes that no request to exonerate the bond had been placed on calendar, and thus she had no advance notice that such an order might be made.

Although Cummins responds to that point by claiming he sought exoneration of his bond as part of his response to the petition to appoint Huntington, and thus that Dolley had notice of it, the claim is not persuasive. It is true that at the end of Cummins' response, under the heading "*Other issues*," he did claim that the bond "should either be exonerated, or the new trustee should be ordered to pay the premiums until the bond is exonerated." But that is *all* he said.

Nowhere did Cummins specify when the choice should be made between those two options, nor did he include any exoneration provision in the proposed order he submitted at that time. Instead, that initial proposed order included a provision requiring Cummins to submit an accounting to the court as part of the transition to the new cotrustee, and also one allowing Cummins to retain sufficient trust funds during the transition period "to pay . . . premiums for the fiduciary bond for Mr. Cummins on file in this matter." That proposed provision is simply inconsistent with the idea Cummins was actually seeking the immediate exoneration of the bond.

But the more significant – and more troubling – problem with this provision is that the record reflects the court ordered *no exoneration of the bond in the course of the*

hearing. And yet, when Cummins filed his proposed order at the end of the hearing, he deleted the initially proposed accounting provision, and substituted it with a provision exonerating his bond – while claiming that exoneration had been *stipulated to*. As we have already noted, the record reflects no such stipulation.

In his opposition to this writ, Cummins cites only to the order itself – which is pointedly *not signed* by Dolley's counsel – as the "evidence" of this purported stipulation. Cummins' counsel also claims – in the opposition brief – a *recollection* that the parties had orally stipulated to exoneration at the hearing, but speculates that portion of the transcript was omitted. However, he does not file any declaration attesting to that recollection which might be treated as evidence supporting such a claim.

In the absence of actual proof of a stipulation, the bond should not have been exonerated. No request to exonerate the bond was properly before the court at the hearing, and the record does not reflect the court otherwise intended to make such an order – it is certainly not mentioned in the minute order. Instead, the minute order makes clear the court expected that Cummins would *remain* as cotrustee until Huntington was officially in place. The immediate exoneration of Cummins' fiduciary bond, coupled with a requirement that he continue to operate in his fiduciary role for some period of time into the future, simply makes no sense.

III

CUMMINS' COURSE OF CONDUCT

Despite the fact this court specifically chastised Cummins for creating and submitting a misleading and erroneous "notice of ruling" in connection with the prior appeal, he was apparently unchastened, and has continued to engage in what appears to be conduct entirely inappropriate for a "neutral" trustee.

Indeed, Cummins' own response to Dolley's writ petition gives rise to the inference that he may never have entirely fit within that "neutral" role. In that response, Cummins seems to implicitly concede that he initially viewed the goals of the Trust as

somewhat ambiguous, and rather candidly explains that as an aspect of fulfilling his role as cotrustee, he consulted with both Matthews and the attorney who drafted the Trust to discern Callies' intent. According to Cummins, these men "confirmed . . . that it was Ms. Callies' intention that the trust . . . serve as a safety net to ensure that her mother's necessary living expenses were met, but at the same time, Ms. Callies wanted to preserve *as much as possible* for her daughters." (Italics added.)

Cummins' apparent decision to consult with Matthews, but not Dolley – his cotrustee, the woman the Trust itself identifies as being the original owner of all trust property, and the one whom Callies actually designated to act as her own cotrustee when the Trust was formed – concerning the purposes of the Trust, seems . . . odd.[8] And if Cummins did consult with Dolley, it seems significant that he is not claiming she also supported the interpretation "confirmed" by Matthews and the attorney.

But of course, the intent of the Trust is to be determined from an examination of its provisions, not by an informal poll of those who claim to have known the settlor's mind, and if Cummins felt the terms of the Trust were ambiguous, creating some conflict between the expressed goal of properly supporting Dolley during her lifetime, and the unexpressed goal of preserving as much as possible for Callies' daughters, then his appropriate course was to petition the court for direction.

Probate Code section 17200, subdivision (b)(1), provides the trustee may petition the court for direction concerning "questions of construction of a trust instrument." Had Cummins done that, all interested parties would have had the opportunity to weigh in with whatever arguments and evidence they believed properly bore upon the issue. But Cummins did no such thing. Instead, by his own description, he simply sought confirmation from Matthews and the drafting attorney as to Callies'

[8] Cummins does claim in his informal response that Dolley has "steadfastly refused to talk to" him since 2004, but also claims that she sends him "written missives . . . on an almost monthly basis."

intention, and then "administered the Trust accordingly." We cannot condone that approach.

In his informal response, Cummins also describes how he has repeatedly "suggested" to the probate court "that it should limit Dolley's powers as 'co-trustee,'. . . not out of spite or ill will toward Ms. Dolley, but because he believes that doing so is necessary to protect all of the Trust beneficiaries, including Ms. Dolley." He goes on to explain his belief that "Ms. Dolley is not competent to administer the Trust," and suggests she may be "confused and ha[ve] difficulty communicating." However, Cummins does not claim that any of his "suggestions" to the court about limiting Dolley's authority were in the form of a formal petition, supported by admissible evidence which the court could rely upon in considering such a serious contention, and affording Dolley an opportunity to respond. Instead, it seems Cummins may have conducted himself as though his own belief were sufficient to carry the point, and in the expectation the court would simply adopt it upon request.

Most disturbing, however, is the conduct of Cummins and/or his counsel in connection with the order under review in this proceeding. As essentially his last act on the way out the door, Cummins presented the court with a proposed order which included one provision the probate court explicitly stated at the hearing was not before it (the explicit division of the cotrustee powers), and two others based upon purported stipulations which did not exist.

While there may be an innocent explanation for all of this – perhaps something reflected in a portion of the record not provided to us – none immediately presents itself. Instead, we can only assume Cummins simply expected the court would not remember the specifics of what had been decided at the hearing (or, more specifically, what had not been) by the time it was presented with the final order, and would trust that he, as a "neutral" trustee in this matter, had accurately reflected its decision in his proposed order – an expectation which the court apparently fulfilled.

As a result of the court apparently trusting Cummins too much, he seems to have manipulated it into signing an order which conferred substantial benefits to Matthews, at Dolley's expense, without affording her proper notice or an opportunity to be heard. Given these apparent circumstances, the probate court may wish to consider whether some action should be taken against Cummins and/or his counsel in this case. The issue has not been briefed before this court, and thus we express no formal opinion concerning whether, or to what extent, punishment is appropriate.

DISPOSITION

A peremptory writ of mandate shall issue directing the superior court to vacate its October 6, 2009 order, and to issue a new order reflecting only that Huntington is appointed as the successor cotrustee to Cummins; that he shall exercise the same powers given to Cummins under the terms of the settlement agreement entered into between Dolley and Matthews; that he is required to post a bond in the amount of $412,500, and that his appointment shall take effect once he has done so.

Dolley is to recover her costs in this writ proceeding.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.